U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

DATE: May 15, 2000
CASE NO.: 2000 - INA - 85

In the Matter of:
BELLA PIZZA ITALIAN RESTAURANT,
Employer,

on behalf of

ALEJANDRO GARCIA-ROMERO,
Alien.

Appearance: Eunice Becker, Esq.
New York, NY

Certifying Officer: Richard Panati
Philadelphia, PA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Alejandro Garcia-Romero ("Alien") filed by Employer Bella Pizza Italian Restaurant ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there

are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on January 12, 2000; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a grounds of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

On November 16, 1998, Employer filed an application for labor certification to allow it to fill the position of "Italian Specialty Cook" in its Smoketown, Pennsylvania shop. The application was amended on August 30, 1999 to add supervisory duties, and in final form described the position as follows:

> "Prepare and cook Italian specialty items on menu; lasagna, manicotti, cheese & Meat ravioli, tomato sauce, meatballs, sausage & peppers, veal & eggplant parmigiana, and pizza,.[1] supervise the sandwich maker, pizza maker and server; receive and examine supplies and foodstuffs to ensure quality; responsible for daily operation of kitchen during shift."

The cook would work a forty hour week from 10:30 a.m. until 6:30 p.m., at a rate of $10.00 per hour. No overtime was indicated. The only other requirement was two years of experience in the offered job, or in the related occupation of cook (Pizza & Italian Spec.). The latter was also added in August of 1999. (AF 13).

On June 10, 1999, the Alien Labor Certification, Employer Relations Unit ("ALC") of the Pennsylvania Department of Labor informed Employer that the Form 750-A was "incomplete or

[1]It appears from the file that all duties from this point forward were added in August 1999.

improperly executed." Specifically, the ALC indicated that the job appeared to have been misclassified by Employer, and was more properly a "Cook, Specialty," which carried a lower Specific Vocational Preparation ("SVP") level of 5, or up to one year. The two year requirement was therefore excessive. The ALC requested that Employer change the experience requirement to the one year level, or, in the alternative, submit a written justification for the higher experience level. (AF 11-12).

On July 20, 1999, Employer submitted a two page letter to the ALC with a justification of the two year experience requirement. Employer maintained that an experienced cook was needed because the owner/operators were being burned out by the six day a week, twelve hour a day restaurant schedule. They wanted an "experienced and efficient kitchen staff" so that they could take a day off when desired. The Employer also asserted that they had hired less experienced cooks in the past, but that this showed that more than one year was needed to learn to prepare the pizza and Italian dishes on the menu. (AF 22-23)

The application was transmitted to the CO on July 23, 1999. The ALC noted an "occupational title dispute" and requested that the CO make a determination. (AF 9-10).

On July 29, 1999, a Notice of Findings ("NOF") was issued proposing to deny the labor certification based upon a violation of 20 C.F.R. § 656.21(b)(2), which states that the job requirements must be those normally needed for performance of the job, unless justified by a business necessity. The CO found, as the ALC did, that the position had been misclassified as a "Cook, Specialty, Foreign Food" and was properly a "Cook, Specialty," "Baker, Pizza," or "Sandwich Maker." Because these positions have SVP's of 5 or less, according to the Dictionary of Occupational Titles, the two year experience requirement was deemed to be unduly restrictive. This determination was based upon the DOT definitions, the submitted menu, and the stated duties on the Form 750-A.[2] The Employer was given the options of reducing the requirements or establishing a business necessity for the requirement. To show a business necessity, it must be demonstrated that the requirement is necessary to reasonably perform the job duties in the context of Employer's business. (AF 6-8).

A Rebuttal was filed on August 20, 1999. This consisted of a letter from Employer's counsel referring the CO to the July 20, 1999 letter and the added supervisory duties on the Form 750-A. Employer asserted that because the Cook would be running the business in the absence of the owner/operators, the higher experience level was a business necessity. (AF 5).

The CO issued a Final Determination ("FD") on October 29, 1999 denying the application. The CO found that the violation of 20 C.F.R. § 656.21(b)(2) as regards the unduly restrictive requirement had not been corrected. The CO noted that the NOF had offered the

[2]The Form was not amended until August of 1999.

options of dropping the requirement or proving a business necessity. Because the Employer elected to follow a different course, an option not offered by the CO, and amend the job description, the CO found the Rebuttal to be not responsive to the NOF. The NOF was not rebutted, and the application was therefore not certified. (AF 3-4).

Employer requested administrative review by letter of December 3, 1999, stating as grounds the failure of the CO to permit amendment of the application following the issuance of the NOF. The reclassification, Employer maintained, was based upon an incomplete description, and because Employer was not allowed to complete the description, the CO had "limited the legal rights of the employer." Employer disputed the position that expanding the job duties to meet the SVP was not an option available to it. Further, Employer asserted a right to be informed of the authority the CO relied upon in excluding the amended duties. (AF 1).

Discussion

The Employer bears the burden of proof in labor certification proceedings. 20 C.F.R. § 656.2(b). Employer stated in its request for review that the denial was based upon "employers [*sic*] failure to completely describe the job duties." It therefore follows that all advertising of the position and recruitment efforts were invalid, as the true nature of the job was not disclosed to potential applicants. Because the file does not include any record of Employer's recruitment efforts, we must assume that the job was advertised with only the duties originally listed on the Form 750-A.

Further, it is true that an employer may amend its application after the issuance of the NOF, but before the FD. However, offers to amend, especially when the change involves something as substantial as the job duties, must be accompanied by an offer to re-advertise the position. *See, e.g.* Dr. Jitendra Bharucha, 1989-INA-25 (Feb. 9, 1990); Mr. & Mrs. Herbert G. Peabody, 1990-INA-230 (Apr. 30, 1991). Employer here did not offer to re-advertise, even though the Employer has completely changed the job by adding supervisory duties to the Cook position.

Therefore, we find that the application of Employer must be denied, as it was not, by the admission of the Employer, in compliance with the regulations at 20 C.F.R. § 656.21(a)(2). The application did not include a description of the job offer, as it excluded duties which are alleged to be vital to the Employer. Further, the Employer failed to offer to re-advertise the position with the proper duties when it filed its Rebuttal; a remand is not appropriate to cure Employer's admitted errors.

Order

Based upon the foregoing, the Final Determination of the Certifying Officer is affirmed, and the labor certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.